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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92052950
Party	Defendant King Par, LLC
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Attachments	ReplyMotionStrike.pdf (4 pages)(271519 bytes)

**THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

KING PAR, LLC,)	
)	CANCELLATION NO. 92052163
v)	
)	
JOHN S. FRANKLIN)	
)	
AND)	
)	
JOHN S. FRANKLIN,)	
)	CANCELLATION NO. 92052950
v)	
)	
KING PAR, LLC)	
)	

**REPLY TO MOTION TO STRIKE PLAINTIFF/COUNTERCLAIM
DEFENDANT'S EVIDENTIARY MATTER ATTACHED
TO TRIAL BRIEF**

Now comes the above-named Plaintiff/Counterclaim Defendant, by and through its attorney, and in response to the Defendant/Counterclaim Plaintiff's Motion to Strike, states as follows:

INTRODUCTION

Defendant/Counterclaim Plaintiff's Motion to Strike is directed to Plaintiff/Counterclaim Defendant's Notice of Reliance served on Defendant/Counterclaim Plaintiff's attorneys on November 15, 2011.

ARGUMENT

Pursuant to 37 C.F.R. § 2.120(j):

“The discovery deposition of a party or of anyone who at the time of taking of the deposition was an officer, director or managing agent of a party...may be offered in evidence by an adverse party.”

Further, trial testimony is explained in 37 C.F.R. § 2.123(a)(1) that provides that:

“The testimony of witnesses in the...party’s cases may be taken by depositions upon oral examination as provided by this section...”

In the present case, the depositions of Ryan Coffell, John Franklin and Mark Schlosser, all appropriately noticed to the Defendant/Counterclaim Plaintiff and were taken prior to the close of Plaintiff/Counterclaim Defendant’s discovery period on March 9, 2011. The Defendant/Counterclaim Plaintiff declined to attend the depositions of Coffell and Schlosser, and Defendant/Counterclaim Plaintiff’s attorney, Eric Geffner, attended the deposition of Mr. Franklin.

At the commencement of each deposition, it was announced that the deposition was a trial deposition. (See Exhibits A, B and C attached to Plaintiff/Counterclaim Defendant’s opening brief)

Plaintiff/Counterclaim Defendant concedes that, in order for a discovery deposition to form a part of the evidentiary record, it must be offered into evidence during the party’s testimony period, together with a notice of reliance. Plaintiff/Counterclaim Defendant further concedes that the Coffell, Franklin and Schlosser depositions were not filed, nor was notice of reliance filed, until November 15, 2011, outside the date specified by the rules.

The Plaintiff/Counterclaim Defendant submits, however, that the Board should allow the filing of the deposition transcripts *nunc pro tunc*.

The Board has authority to allow a discovery deposition to be treated as part of the record, even if not submitted properly via a notice of reliance. *Made To Order of Ohio, Inc. v Made-To-Order, Inc.*, 78 USPQ 2nd 1899 (TTAB 2006)

Further, trial testimony depositions taken in inter-party proceedings, when filed, automatically constitute part of the evidentiary record in the proceeding. 37 C.F.R. 37 § 2.123(h). This includes allowing testimony depositions to be filed for the first time with the applicant's brief in situations where the opposer should have assumed it would become part of the record. *Hewlett-Packard Co. v Human Performance Measurement, Inc.*, 23 USPQ 2nd 1390 (TTAB 1991).

In the present case, Defendant/Counterclaim Plaintiff has had ample opportunity to attend the subject depositions, and in fact, was represented at one of them. There is no prejudice to Defendant/Counterclaim Plaintiff simply because the transcript of the deposition testimony was filed for the first time with Plaintiff/Counterclaim Defendant's brief.

Respectfully submitted,

/Marshall G. MacFarlane/
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Attorneys for Plaintiff King Par, LLC

December 21, 2011

CERTIFICATE OF MAILING

I hereby certify that this correspondence: **REPLY TO MOTION TO STRIKE PLAINTIFF/COUNTERCLAIM DEFENDANT'S EVIDENTIARY MATTER ATTACHED TO TRIAL BRIEF**, is being filed with the TTAB electronically, on December 21, 2011.

/Marshall G. MacFarlane/
Marshall G. MacFarlane

CERTIFICATE OF SERVICE

I hereby certify that this correspondence: **REPLY TO MOTION TO STRIKE PLAINTIFF/COUNTERCLAIM DEFENDANT'S EVIDENTIARY MATTER ATTACHED TO TRIAL BRIEF**, is being deposited with the United States Postal Service, 1st Class Mail, postage prepaid, in an envelope addressed to Douglas M. Kautzky, 3868 Carson Street, Suite 105, Torrance, California 90503, on December 21, 2011.

/Marshall G. MacFarlane/
Marshall G. MacFarlane